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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PACIFIC FUNDING GROUP, INC., Plaintiff and Respondent, v. CALIFORNIA BANK & TRUST, Defendant and Appellant.	B235682 (Los Angeles County Super. Ct. No. LC087843)

APPEAL from an order of the Superior Court of Los Angeles County. Louis M. Meisinger, Judge. Affirmed.

Frandzel Robins Bloom & Csato, Michael G. Fletcher, Hal D. Goldflam and Brad R. Becker for Defendant and Appellant.

Glazer & Blinder, Mark S. Glazer and David M.S. Taam for Plaintiff and Respondent.

Defendant and appellant California Bank & Trust (the bank) appeals from an order denying its motion to compel arbitration of a lawsuit brought against it by plaintiff and respondent Pacific Funding Group, Inc. (Pacific). The bank contends the trial court erred in finding it had waived the right to compel arbitration. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Pacific is in the business of making loans. In July 2006, Pacific entered into a Business Loan Agreement with now defunct Alliance Bank pursuant to which Alliance agreed to extend to Pacific a $2 million line of credit to finance loans made to third parties. The July 2006 agreement was extended and eventually superseded by a February 2008 Business Loan Agreement. In 2009, Alliance was closed by federal and state authorities. The bank is the successor in interest to Alliance.

Both the 2006 and 2008 agreements contained similar arbitration clauses. In relevant part, the 2008 arbitration clause reads: "Borrower and Lender agree that all disputes, claims and controversies between them whether individual, joint, or class in nature, arising from this Agreement or otherwise, including without limitation contract and tort disputes, shall be arbitrated . . . upon request of either party. . . . The Federal Arbitration Act [(FAA; 9 U.S.C.A. § 1 et seq.)] shall apply to the construction, interpretation, and enforcement of this arbitration provision."

Pacific and the bank are currently engaged in two separate lawsuits: this action (*Pacific v. California Bank*) and another action brought by the bank against Pacific, among others (*California Bank v. Pacific*) (Super. Ct. L.A. County, 2011, case No. LC089629).

Pacific v. California Bank

In December 2009, Pacific brought this action against the bank. The factual allegations of the operative complaint for breach of implied agreements and the implied covenant of good faith and fair dealing, fraudulent concealment and negligence, are as follows. In October 2006, Centrium Associates, LLC owned certain real property in

South Carolina which was subject to a $2.5 million first deed of trust. Pacific agreed to loan Centrium $1.645 million, in exchange for which Centrium executed a promissory note secured by a commercial mortgage on the property. Pacific used its line of credit with the bank to make the loan to Centrium and Centrium executed a second deed of trust on the property in favor of the bank. Although Centrium had not repaid Pacific, on April 17, 2007, Pacific repaid the bank the full $1.645 million plus interest. As was the usual practice in the industry, the bank was to immediately assign and record the second deed of trust to Pacific. The bank did not do so until August 9, 2007. Meanwhile, after Pacific satisfied the loan but before the bank assigned the second deed of trust to Pacific, the first trust deed holder commenced judicial foreclosure proceedings on the property. The bank never informed Pacific of the foreclosure proceedings, never forwarded any of the pleadings with which it was served to Pacific (including notice of default) and never told the plaintiff in the foreclosure proceedings that the second deed of trust had been assigned to Pacific. Pacific first learned of the foreclosure proceedings on December 6, 2007. By that time, Centrium's debt to the first trust deed holder had increased significantly.

Pacific filed its original complaint in December 2009, the gravamen of which was that, as a result of the bank's failure to immediately execute and record the assignment, and to tell Pacific about the foreclosure proceedings, Pacific was unable to protect its $1.645 million interest in the property. The bank's March 2010 demurrer was placed off calendar after Pacific filed a first amended complaint in July 2010.[1] On December 2, 2010, the trial court sustained with leave to amend the bank's demurrer to the first amended complaint. On January 4, 2011, the bank filed a case management statement in

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[1] While its demurrer to the original complaint was pending, the bank filed a separate action against Pacific (*California Bank v. Pacific*), which we discuss in more detail, *infra*. Pacific filed a motion in this case to deem the cases related, which was denied without prejudice by Judge Bert Glennon. Judge Glennon later presided over *California Bank v. Pacific.* Meanwhile, the present case was reassigned to Judge Louis M. Meisinger for all purposes and it was Judge Meisinger who denied the bank's motion to compel arbitration.

which it checked the box for nonjury trial; it did not mark the box indicating willingness to participate in binding arbitration. After additional trial court proceedings, the parties stipulated that, in lieu of Pacific filing a fourth amended complaint, the bank would answer the third amended complaint.

On June 23, 2011, the bank filed a general denial to the third amended complaint which included as an affirmative defense that Pacific's claims were subject to binding arbitration; the bank had requested Pacific to submit to arbitration but Pacific had refused to do so; and Pacific also refused to extend the time for the bank to file a responsive pleading to give the bank an opportunity to bring a motion to compel arbitration.

California Bank v. Pacific

Meanwhile, on May 4, 2010 (when its demurrer to the original complaint in *Pacific v. California Bank* was still pending), the bank initiated *California Bank v. Pacific* with the filing of a verified complaint naming as defendants Pacific and its principals. The gravamen of *California Bank v. Pacific* was that the bank had loaned Pacific $2 million, and Pacific had defaulted on the loan which had an outstanding principal balance of $1.110 million, plus interest.

The loans that are the basis of the bank's claims in the *California Bond v. Pacific* are unrelated to the loan in this appeal. All of the loans, however, were made pursuant to the same business loan agreements between Pacific and the bank. Pacific's verified answer to the operative second amended complaint in *California Bank v. Pacific* included an affirmative defense of set-off, which incorporated by reference the allegations of the complaint in *Pacific v. California Bank.*

At the June 28, 2011 hearing on the bank's motion for summary judgment in the second lawsuit, the trial court stated its intention to deny summary judgment because it believed that, as a result of Pacific's set-off affirmative defense, the cases were related. After hearing oral argument, the trial court instead granted summary judgment in favor of the bank. The trial court subsequently granted Pacific's motion to stay judgment without

a bond. The appeal of Pacific and the individual defendants from the judgment entered in *California Bank v. Pacific* is currently pending in this Division, with briefing not yet completed (case No. B237336).

The Motion to Compel Arbitration in Pacific v. California Bank

On July 1, 2011, after it obtained summary judgment in *California Bank v. Pacific*, the bank moved to compel arbitration in this case. When the bank filed its motion to compel, the present lawsuit had been pending in the trial court for approximately 19 months. In opposition to the motion to compel arbitration, Pacific's attorney, Mark Glazer, averred that at a hearing in *California Bank v. Pacific*, the bank's attorney, Hal Goldflam, told him that if the trial court denied the bank's summary judgment motion, the bank would file a motion to arbitrate that case as well.

At the hearing on the motion, the trial court took judicial notice of the 2006 and 2008 Business Loan Agreements, and a 2006 Commercial Security Agreement. The trial court denied the bank's motion to compel arbitration. It reasoned that the parties knew about the agreement that contained the arbitration clause. Moreover, "the level of participation in the litigation here was extensive, four demurrers, at least six court appearances, [and] we are close to trial . . . . [¶] The other thing is that there really is little justification, in my mind, for waiting so long to – for participating in trial setting conferences without indicating anything about arbitration . . . ." The trial court also noted that, by engaging in extensive discovery in *California Bank v. Pacific*, the bank "in essence, achieved the benefits of litigation which would not otherwise have been available to them had they pursued this matter in arbitration."

The bank timely appealed.

DISCUSSION

A. Choice of Law and Standard of Review

The FAA applies to contracts involving interstate commerce. (*Aviation Data, Inc. v. American Express Travel Related Services Co., Inc.* (2007) 152 Cal.App.4th 1522, 1534 (*Aviation*).) "Under the FAA, waiver of the right to compel arbitration is not viewed as a question of substantive contract law. . . . 'Waiver, in the arbitration context, involves the circumstances under which a party is foreclosed from electing an arbitration forum. Therefore, the question of whether a party has waived its right to compel arbitration directly concerns the allocation of power between courts and arbitrators. [Citation.]' [Citation.] Therefore, 'it is federal law, not state, that governs the inquiry into whether a party has waived its right to arbitration.' [Citations.]" (*Id.* at pp. 1535-1536.)

In *Aviation, supra*, the court concluded that under both federal and state law, the appellate court defers to the trial court's factual findings but independently reviews questions of law. (*Aviation, supra*, 152 Cal.App.4th at p. 1536.) In *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 (*St. Agnes*), our Supreme Court explained: "Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] 'When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.' [Citation.]" Here, the relevant facts are undisputed. Accordingly, we independently review the question of whether the bank waived its right to compel arbitration.

B. The Bank Waived Its Right to Compel Arbitration

The bank contends the trial court erred in finding that the bank waived its right to compel arbitration of Pacific's claims. The bank argues (1) the issue of waiver was for the arbitrator, not the trial court, to decide in the first instance; and (2) Pacific did not

establish that the bank knew of its right to arbitrate, acted inconsistently with that right, or that Pacific was prejudiced. We find no error.

1. The trial court properly decided the issue of waiver in the first instance

In *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84, the United States Supreme Court characterized "allegations of waiver, delay, or a like defense to arbitrability" as "procedural questions" presumptively to be decided by the arbitrator. *Howsam* was followed in *Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 962-964 (*Omar*), a decision on which the bank relies. But subsequent Circuit Courts have interpreted *Howsam* as allocating the issue of waiver to the court where waiver is based on litigation-related conduct of the party seeking to compel arbitration. (See, e.g., *Grigsby & Assoc., Inc. v. M. Securities Inv.* (11th Cir. 2011) 664 F.3d 1350, 1353 & cases cited therein; *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1120 [the waiver defense to enforcement of an arbitration clause is properly decided by the district court]; see also Code Civ. Proc., § 1281.2 [under the California Arbitration Act, the court determines whether the party seeking arbitration has waived the right to compel arbitration].)

Here, because the bank seeks to compel arbitration and the waiver claim is based on the bank's litigation-related conduct, the trial court properly decided the issue.

2. The bank knew or reasonably should have known of its right to compel arbitration

The bank argues that it did not waive its right to compel arbitration because it was not clear until Pacific's third amended complaint that Pacific's claims arose out of the Business Loan Agreements that contained the arbitration clause. The facts are to the contrary.

Pacific's original complaint for, among other things, breach of contract, was filed on December 7, 2009. It alleged that Pacific "used its line of credit at [the bank] to obtain the funds to loan to Centrium." In its demurrer to the original complaint filed in

March 2010, the bank stated that Pacific, "drew down on its letter of credit with [the bank] to fund the Centrium loan." Nothing in the record suggests that Pacific had any "Line of Credit" with the bank other than the Business Loan Agreements. Under these circumstances, the bank's suggestion that it did not know Pacific's claims arose out of the Business Loan Agreements until the third amended complaint was filed is not credible. At the very least, the trial court was entitled to so find.

3. The bank acted inconsistently with its right to compel arbitration

The bank next argues that, under *Groom v. Health Net* (2000) 82 Cal.App.4th 1189 (*Groom*), filing a series of demurrers in this action and bringing the *California Bank v. Pacific* lawsuit were not acts inconsistent with arbitration. We disagree.

There is no single test to establish waiver of the right to arbitration. (*Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1450 (*Adolph*).) Our Supreme Court has identified the following factors to be considered: (1) whether the actions of the party seeking arbitration are inconsistent with the right to arbitrate; (2) whether " 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party." ' [Citation.]" (*St. Agnes, supra*, 31 Cal.4th at p. 1196.) Prejudice " 'typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration. [¶] For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side' case that could not have been gained in arbitration [citations]; where a party unduly delayed and waited until the

eve of trial to seek arbitration [citation]; or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence . . . .' [Citation.]" (*Adolph, supra,* at p. 1451.)

In *Groom,* the insured sued her health insurer alleging that she suffered a debilitating stroke as a result of the insurer's refusal to provide necessary medication and diagnostic tests. The insurer demurred to the original and three amended complaints before it moved to compel arbitration. The trial court denied the motion because the insurer had participated in litigation for over a year before moving to compel arbitration. The appellate court reversed, reasoning that "participation in litigation by way of demurrers did not, in the absence of prejudice to [the plaintiff], waive [the defendant's] right to enforce the arbitration agreement between the parties." (*Groom, supra,* 82 Cal.App.4th at p. 1191.) The court explained that the demurrer activity in that case was not the equivalent of litigation on the merits. (*Id*. at p. 1195; but see *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 948 (*Burton*) ["*Groom* . . . erred in failing to recognize that a petitioning party's conduct in stretching out the litigation process itself may cause prejudice by depriving the other party of" the expediency of arbitration].)

The issue in *St. Agnes* was whether the defendant insurance company waived its contractual right to arbitrate a dispute with the plaintiff medical center by filing a separate lawsuit that contained nonarbitrable claims. The court concluded that it did not. (*St. Agnes, supra,* 31 Cal.4th at pp. 1201-1202.) The court found the medical center did not establish prejudice: "The record in this case does not reflect that the parties have litigated the merits or the substance of St. Agnes's arbitrable claims, or that any discovery of those claims has occurred. Nor is there any indication that PacifiCare used the [two lawsuits] to gain information about St. Agnes's case that would be unavailable in arbitration." (*Id.* at p. 1204.)

By contrast, in *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 782 (*Christensen*), the plaintiff admitted that it was aware of the arbitration provision and its applicability, but filed an action in superior court to obtain a set of verified pleadings which would reveal the defendants' legal strategies and theories. The court concluded

that "[s]uch procedural gamesmanship provides amble support for the trial judge's conclusion that plaintiffs filed their action in bad faith, and by doing so waived their right to arbitrate." (*Id.* at p. 784.) And in *Adolph*, the court found waiver where the defendant waited six months after the complaint was filed before moving to compel arbitration, had filed two demurrers, accepted and contested discovery requests, engaged in efforts to schedule discovery, and omitted to assert arbitration in its case management statement. (*Adolph, supra*, 184 Cal.App.4th at p. 1451.)

The facts of our case are closer to *Christensen* and *Adolph* than to *Groom* or *St. Agnes.* Here, as in *Christensen*, the trial court reasonably could have found that the verified pleadings and discovery the bank obtained in *California Bank v. Pacific*, which arose from the same contract as the claims in this case, revealed Pacific's legal strategies and theories applicable not just to that case, but to the present case as well. As in *Adolph*, the bank omitted to assert arbitration in its case management statements. These acts established sufficient grounds to support a finding of waiver of the right to arbitrate.

4. Prejudice

The bank maintains that Pacific suffered no prejudice as a result of the bank's conduct. We disagree.

"[P]rejudice can be established when the party seeking arbitration used judicial discovery procedures not available in arbitration to obtain discovery of the opposing party's strategies, evidence, theories, or defenses." (*Groom, supra*, 82 Cal.App.4th at p. 1196, italics omitted.) Prejudice can also be established by the use of verified pleadings to obtain the same result. (See *Christensen, supra*, 33 Cal.3d at p. 784.) Moreover, an egregious delay in seeking arbitration may also result in prejudice by depriving the other party of the advantages of expediency and cost-effectiveness associated with arbitration. (*Burton, supra*, 190 Cal.App.4th at p. 948.)

Here, the bank waited 19 months to request arbitration. Although there was no discovery in the present case, Pacific's answers to the discovery and verified pleadings in *California Bank v. Pacific*, gave the bank access to information about Pacific's legal

strategies and theories that it would not have otherwise obtained. This was sufficient to establish prejudice.

DISPOSITION

The judgment is affirmed. Pacific shall recover its costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.